



March 17, 2017

By ECFS and <http://foiaonline.regulations.gov>

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WT Docket No. 12-202,
Request for Confidential Treatment of Progeny LMS, LLC

Dear Ms. Dortch:

PCS Partners, L.P. (“PCSP”), by its counsel, hereby opposes the Request for Confidential Treatment filed March 1, 2017 (the “Request”) by Progeny LMS, LLC (“Progeny”), and requests immediate access to Progeny’s First Progress Report filed March 1, 2017 in WT Docket No. 12-202, which is the subject of the Request.

Consistent with the presumption in favor of disclosure codified in the Freedom of Information Act (“FOIA”), and with the public interest, the Commission should deny Progeny’s Request and make the First Progress Report available for review.

Progeny’s First Progress Report addresses implementation by wireless carriers of technology developed by Progeny’s affiliate NextNav, LLC (“NextNav”). In January 2017, the Wireless Telecommunications Bureau granted Progeny a waiver of construction deadlines associated with its M-LMS licenses predicated on future service to wireless carriers utilizing the NextNav technology.¹ That grant is subject to certain express conditions, including that Progeny “fil[e] periodic reports [in] . . . WT Docket No. 12-202 . . . demonstrating its progress toward meeting the extended construction deadlines.”² The Bureau emphasized that “[t]hese reports are necessary because a waiver would not be warranted absent a direct link between Progeny’s proposed service offering and the likelihood of its carrier customers being able to benefit the public through compliance with the Indoor Location Accuracy Order requirements.”³

¹ *Request of Progeny LMS, LLC for Waiver and Limited Extension of Time*, Order, DA 17-20 (MD Jan. 17, 2017) (“*Waiver Order*”).

² *Id.* at ¶ 35.

³ *Id.* The *Indoor Location Accuracy Order* required commercial mobile radio service (“CMRS”) providers to establish a test bed by August 3, 2016, to validate technologies meeting requirements intended for indoor location, including dispatchable location technologies and those that deliver horizontal and/or vertical coordinates, in order for the test results to be considered valid for compliance purposes. *Wireless E911 Location Accuracy Requirements, Fourth Report and Order*, 30 FCC Rcd 1259, ¶¶ 126-132 (2015) (“*Indoor Location Accuracy Order*”); 47 C.F.R. § 20.18(i)(3)(i). {00108091;v1}



Progeny has requested confidential treatment of its **entire** First Progress Report. Not a single word of the report is available for public inspection, and there is no way to determine if the public benefits identified by the Bureau are being realized, including whether Progeny is in fact making “substantial progress toward bringing compatible handsets to market,” providing service to any carriers, has developed a plan for site deployment, testing, and activation in each of its markets, or when it commenced and/or completed testing in the Indoor Location Accuracy Test Bed – all of which is required to be included in its reports.⁴ Therefore, any party, such as PCSP, that has an interest in the development of location accuracy technologies in the M-LMS bands generally, and in the Bureau’s decisions in WT Docket No. 12-202, is prevented from viewing significant relevant information.

Section 0.459 requires that a request for confidential treatment “contain a statement of the reasons for withholding the materials from inspection . . . and of the facts upon which those records are based.”⁵ Progeny’s Request provided no factual basis for withholding the information from review, instead making sweeping general statements about the type of information in the report and its confidential nature.

The Request states that it is submitted pursuant to Sections 0.457 and 0.459 of the Commission’s Rules. However, Section 0.457 – entitled “Records Not Routinely Made Available for Public Inspection” – does not apply to the Request. Sections 0.457(d)(1)(i)-(ix) list materials that are not routinely available for public inspection and the Request on its face contains no such materials. Consequently, the information is not entitled to be withheld from the public as “records not routinely available for public inspection.”

With respect to Section 0.459, that rule (FOIA “Exemption 4”), allows the Commission to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁶ For purposes of the FOIA, a trade secret is defined as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”⁷ Progeny’s broad-brush, generic assertions of entitlement to confidential treatment do not identify what basis, if any, there is for such treatment under Section 0.459. The Request provide no factual basis for withholding information about testing status or the other required disclosures, or to support the claim that such information is a trade secret or commercial or financial information.

Finally, although Progeny makes blanket claims that none of the information in its First Progress Report is available to the public and that all of it is subject to non-disclosure agreements (Request at 3), it is not clear if that is accurate. Nationwide CMRS providers were required to file a report by February 3, 2017 detailing their plans to meet location accuracy milestones.⁸ AT&T in its report stated that it “continues to

⁴ *Waiver Order* at ¶ 35. If the requisite progress is not being made, Progeny must demonstrate that the waiver it obtained is in the public interest. *Id.*

⁵ 47 C.F.R. § 0.459(b).

⁶ 5 U.S.C. § 552(b)(4).

⁷ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order*, 13 FCC Rcd 24816, ¶ 3 (1998).

⁸ *Indoor Location Accuracy Order*, ¶ 37; 47 C.F.R. § 20.18(i)(4)(i).



test and evaluate the NextNav technology and was supportive of formally testing the solution in the Test Bed. Unfortunately, the technology has not been widely incorporated into commercial handsets and while we continue to monitor this technology, it is not operational within our network at this time.”⁹ Verizon also referred to its testing with NextNav, which it identified as having participated in Stage 2 testing, but not in ongoing Stage 3 testing.¹⁰ Although there is no basis to withhold from public view **any** information that does not qualify for confidential treatment under FOIA Exemption 4, at a minimum information that is public should be immediately disclosed.

PCSP is prepared to pay in full the applicable fee to obtain a copy of the First Progress Report.

Please contact PCSP’s undersigned counsel with any questions regarding this matter.

Respectfully submitted,

/s/ E. Ashton Johnston

E. Ashton Johnston

Counsel to PCS Partners, L.P.

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⁹ *In the Matter of Wireless E911 Location Accuracy Requirements*, PS Dkt. 07-114, AT&T Initial E911 Indoor Location Accuracy Implementation Plan and Progress Report, at 12 (Feb. 3, 2017).

¹⁰ PS Dkt. 07-114, Verizon Initial E911 Indoor Location Accuracy Implementation Plan and Progress Report, at 5 (Feb. 3, 2017).